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TO: Supreme Court Clerk

FROM: Terri L. Stangl, Executive Director

RE: File No. 2002-37 Proposed E-filing Standards

DATE: January 1, 2003

I am writing to comment on sections of the proposed e-filing rule that will have special significance to litigants who are not represented by counsel, as well as those who are illiterate, with limited English proficiency (LEP), or who have disabilities. Attorneys with disabilities may also need special accommodations. In my 20 years of practice representing indigent persons, I have helped to set up systems and materials that help pro se litigants to have meaningful access to the court. I continue to work with many legal services advocates who are also concerned about how pro se litigants will access the courts. This is particularly important at a time when, due to funding cuts, the legal services providers in Michigan have fewer resources to serve indigent persons in civil matters.

After consulting with a number of other legal services advocates in the state, I respectfully suggest that several changes be incorporated into the proposed standards for electronic filing processes. Some, but not all of these suggestions, are at least partially addressed by the proposed standards, particularly Standard 1.1L:

Standard 1.1L Addressing the Special Needs of Users

Current Standard: *In developing and implementing electronic filing, courts will consider the needs of indigent, self-represented, non-English speaking, or illiterate persons and the challenges facing persons lacking access to or skills in the use of computers.*

In general, this standard needs to be more prescriptive to ensure meaningful access to this new digital justice system to all users. To that end I suggest changing the language of the standard as follows:

*In developing and implementing electronic filing, courts ~~will consider~~ **must provide for** the needs of indigent, self-represented, ~~non-English speaking,~~*

*or illiterate persons, **those of limited English proficiency** and the challenges facing **persons with disabilities** or persons lacking access to or skills in the use of computers.*

Here again, the comments to the standard should be more prescriptive. I recommend the following changes:

The intent of this standard is for courts to take ~~reasonable~~ steps to ensure that electronic filing systems promote, rather than create barriers to, public access to the courts.

*Courts ~~can~~ **shall** ensure that electronic filing processes comply with any requirements imposed by the Americans with Disabilities Act or the Rehabilitation Act. They ~~can~~ **shall** ensure that websites used for electronic filing are “Bobby compliant” (i.e., that they comply with the Bobby Worldwide guidelines developed by the Center for Applied Special Technology, a non-profit organization devoted to insuring access to technology for persons with disabilities. See <http://www.cast.org/Bobby> “Bobby compliance” ensures that a website’s content is accessible by a person using special readers for persons with sight and hearing disabilities.*

*Courts ~~can~~ **shall** waive any fees associated with electronic filing or with electronic access to electronic records for persons who are not able to pay them. They ~~can~~ **shall** require that private sector service providers operating electronic filing systems for the court make those services available at no cost to indigent persons or self-represented persons without regards to a means test.*

*Courts ~~can~~ **shall** ensure that their electronic filing applications are as simple and easy to use as possible, through user testing processes that involve members of the public and self represented litigants as well as lawyers and their staff.*

I recommend that all references to “non-English speaking” in this standard and commentary be changed to “those with limited English proficiency”. LEP is the term specifically recognized under Title VI and within Department of Justice materials discussing implementation of the Civil Rights Act of 1964.

I agree with the commentary in Standard 1.1L that persons who are illiterate, of limited English proficiency, or with disabilities “will require significant amounts of personal assistance from court staff or other community resources” in order to use e-filing successfully. Bilingual support staff members are especially essential in providing support services to those with limited English proficiency. Similarly, court staff should

be trained to meet the unique needs of other special populations. Because of the burden that this may place on local court personnel, I believe it would be desirable to allow these populations the option of paper filing. Courts, of course, could use scanners to convert these paper documents to electronic form for more uniform storage and retrieval.

Standard 1.3B Mandatory Electronic Filing Processes

Current Standard:

Court rules may mandate use of an electronic filing process if the court provides a free electronic filing process, the court allows for the exceptions needed to ensure access to justice for indigent, disabled or self-represented litigants, the court provides adequate advanced notice of the mandatory participation requirement, and the court (or its representative) provides training for filers in the use of the process.

I recommend that “limited English proficiency” litigants be added to the list of exceptions for the reason listed above. I also recommend that the phrase ‘persons with disabilities’ be substituted for the word “disabled”, since that is the phrasing that is generally preferred by those with disabilities.

*Court rules may mandate use of an electronic filing process if the court provides a free electronic filing process, the court allows for the exceptions needed to ensure access to justice for **litigants who are indigent or self-represented or who have disabilities or limited English proficiency**, the court provides adequate advanced notice of the mandatory participation requirement, and the court (or its representative) provides training for filers in the use of the process.*

I agree strongly that any electronic filing process should be non-mandatory for all unrepresented individuals. In addition to the “indigent, disabled or self-represented litigants”, the court rules should permit exceptions for persons who can not read English and those with limited English Proficiency (oral or writing skills). As explained earlier in connection with Standard 1.1L, these individuals may require greater assistance from courthouse personnel.

Waiver of Fees and Surcharges

1. **The e-filing standards do not provide courts with guidance on how to handle waiver of fees.** Although the proposed e-filing standards provide in Standards 1.1L and 1.1J that an e-filing system must assure that indigent persons can waive fees and any surcharges should be waived in an e-filing system, the standards do not specify how persons, who cannot pay to access the e-filing system, will be determined eligible for a waiver of fees.

MCR 2.002 requires courts to waive fees for persons on public assistance. The current practice in most courts is for clerks to authorize a waiver of fees if the indigent party attests to the receipt of public assistance. In other cases, the case is accepted provisionally by the court pending a ruling by a judge on whether fees should be waived. (See Affidavit of Indigency Form MC 07). Unless the standards make it clear that courts should not require e-filing of affidavits of indigency and requests for waivers of fees, or unless such waivers can be obtained as part of the registration process (see below) for those indigent litigants who do choose e-filing, the process will generate an unacceptable result: an indigent litigant cannot access the court for a ruling on whether he or she can access the court.

2. The proposed e-filing rule envisions a process by which users pay both a filing fee and a potential surcharge for use of the e-filing system. **If charges are to be contemplated, I recommend the "hybrid" model outlined in Standard 1.1J** because it provides for free electronic filing as well as limited, free support services. More extensive support services, which may offer special conveniences and benefits (especially for high volume users), could be offered for a fee.
3. **If registration is required to access an electronic filing system, the registration process should be simple and free of charge (1.1G).** Any registration procedure should include a procedure and instructions for obtaining waiver of fees. This could be done automatically for persons who verify that they are on public assistance, or through court order for those not on public assistance but considered indigent. Waiver of fees should also constitute an automatic waiver of any surcharges.

Conversion of Documents to Electronic Format

Standard 1.1D Document Format

Current Standard:

Courts will require electronic documents to be submitted in a format that is renderable, and, when possible, searchable and tagged. Courts will only require formats for which software to read and write documents is available free for viewing and is available free or at a reasonable cost for writing and printing.

Low-income users will not be able to purchase special software for creating court documents. Therefore, I recommend the following change to this standard:

*Courts will require electronic documents to be submitted in a format that is open source, renderable, and, when possible, searchable and tagged. Courts will only require formats for which software to read and write documents is available **for free** ~~for viewing and is available free or at a reasonable cost for writing and printing.~~*

Section 3.3.2 of the proposed standards contemplates that a number of court documents must be converted to electronic format before filing, e.g. affidavits, exhibits, etc. Unrepresented litigants, especially those of modest means, will not necessarily have access to scanning equipment, which may be necessary. Many litigants and some attorneys may not have access to imaging software such as adobe acrobat.¹ If courts require conversion of such documents to electronic form, computers and user support should be made available in courthouses and, where feasible, other public facilities. I note here that provision should also be made for free access to scanners and computers with imaging software for use by the indigent and other special population members who would otherwise not have access to such devices and software.

Privacy

Section 3.7 of the proposed standards describes several options for shielding various data fields. I agree that courts need flexibility. However, in the age of identity theft, I feel that special emphasis should be placed on the need to protect privacy, especially with regard to social security numbers and other account numbers. In addition, information about addresses and medical conditions should not be readily available to all through the Internet. In domestic violence situations, for example, it can be critical to keep an assailant from seeing a victim's address. E-filing systems should include methods to redact this information from electronic files. New standards should be instituted to provide for the restriction of electronic access to causes of action that involve particularly sensitive facts. For example, the Federal District Court for the Western District restricts access to Social Security Appeals Cases to counsel of record.

Implementation of E-filing

I agree with the general intent of Standard 1.1L, which calls for courts to "consider the needs of indigent, self-represented, non-English speaking or illiterate persons" when "developing and implementing electronic filing." However, as stated above, I

¹ The Legal Services community has identified a number of free programs currently exist to convert a text file to PDF:

PDF995 - <http://www.pdf995.com/>

Free PDF - <http://www.webxd.com/zipguy/freepdf.htm>

Free easy PDF - http://www.visagesoft.com/easypdf/easypdf_free.php

recommend that the standard be amended to use the phrase “limited English proficient” instead of “non-English speaking.”

Next, I suggest strongly that the Supreme Court should seek input from representatives from individuals representative of or familiar with the needs of these special populations prior to implementing court rules creating an e-filing system. Similarly, I recommend that the standards require trial courts to set up ad hoc advisory bodies or other meaningful methods of involving representatives from special populations in the local courts’ implementation planning processes. Standard 1.1L suggests that courts develop user-testing processes to help “ensure that electronic filing applications are as simple and easy to use as possible”. I agree with that and would add that such testing procedures should also be designed to identify and address any barriers to use for these special unrepresented populations. Limited pilot projects should be undertaken to test the impact of e-filing on special populations. I further recommend that representatives of these special populations be involved in the testing and evaluation process.

Thank you for your consideration of these recommendations.